Public Prosecutor v Mohd Ridzwan bin Md Borhan

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 1–42–7 OF 2002
LOW HOP BING J
18 DECEMBER 2003

Criminal Law — Penal Code (Malaysia) — s 376 — Rape — Whether lack of consent established — Facts and circumstances considered

Evidence — Corroboration — Rape — Whether evidence to support allegation of lack of consent established

The accused person who was charged for rape was acquitted and discharged by the sessions court on the ground that the medical evidence did not corroborate or support the evidence of the complainant who alleged that the said sexual intercourses were committed by the accused on her without her consent. The prosecution appealed on the ground that the learned trial judge had not fully considered the complainant's evidence and that he had misdirected himself on the corroborative evidence.

Held, dismissing the appeal:

(1) Whether or not there was consent on the part of the complainant was a question of fact which had to be proved by way of positive evidence (see para 27).

(2) The facts and circumstances of the case were more consistent with the existence of consent on the part of the complainant (see para 31).

(3) It is a rule of practice having the force of law that in sexual offences such as rape, the evidence of the complainant must be corroborated (see para 32).

(4) The medical evidence adduced confirmed that the said sexual intercourses were the result of the combined consensual conduct and behaviour of two reasonable adults who were aware of their respective deeds (see para 35).

[Bahasa Malaysia summary

Tertuduh yang dituduh merogol telah dibebas dan dilepaskan oleh mahkamah sesyen atas alasan bahawa keterangan perubatan tidak menyokong keterangan pengadu yang mengatakan bahawa hubung seksual telah dilakukan oleh tertuduh ke atas beliau tanpa persetujuannya. Pihak pendakwa telah merayu atas alasan bahawa hakim perbicaraan yang bijaksana tidak menimbang sepenuhnya keterangan pengadu dan bahawa beliau telah salah arah dalam meneliti keterangan sokongan tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Sama ada atau tidak persetujuan di pihak pengadu adalah satu persoalan fakta hendaklah dibuktikan dengan keterangan yang positif (lihat perenggan 27).

(2) Fakta dan keadaan kes adalah lebih konsisten dengan kewujudan persetujuan di pihak pengadu (lihat perenggan 31).

(3) Adalah rukun amalan yang mempunyai penguatkuasaan undang-undang bahawa dalam kesalahan seksual seperti rogol, keterangan pengadu mesti disokong (lihat perenggan 32).

(4) Keterangan perubatan yang dikemukakan telah mengesahkan bahawa hubungan seksual adalah akibat daripada perbuatan dan kelakuan yang dipersetujui bersama oleh dua orang yang waras yang menyedari perlakuan masing-masing (lihat perenggan 35).]

Notes

For cases on Penal Code s 376, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1591–1613.

For cases on rape, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 925–936.

For rape, see 11 *Halsbury's Laws of Malaysia* para [190.380].

For corroboration, see 12 *Halsbury's Laws of Malaysia* paras [210.148]–[210.149].

Cases referred to

Ab Malek bin Atan v PP [2002] 4 MLJ 84 (refd)
Ah Mee v PP [1967] 1 MLJ 220 (refd)
Chiu Nang Hong v PP [1965] 1 MLJ 40 (refd)
PP v Hassan bin Shamsuddin [1981] 2 MLJ i (refd)
R v Clynes [1960] 44 Cr App R 158 (refd)
Syed Abu Tahir a/l Mohamed Esmail v PP [1988] 3 MLJ 385 (refd)

Legislation referred to

Penal Code s 375

Faradziah bte Kasah (Deputy Public Prosecutor, State Legal Adviser's Dept) for the prosecution.
Markhan Singh (Mohd Latif & Assoc) for the accused.

Low Hop Bing J:

APPEAL

[1] This is an appeal by the learned public prosecutor against the decision of the learned sessions court judge ('the trial judge') who on 28 November 2002 acquitted and discharged the respondent-accused ('the accused') without calling for his defence in relation to the following charge:

> Bahawa kamu pada 22 Julai 2001 jam lebih kurang 10.00 malam hingga 23 Julai 2001 jam lebih kurang 1.00 pagi, didalam pondok kebun durian berhampiran Ladang Sri Gapam Bemban Melaka, di dalam Daerah Jasin, di dalam Negeri Melaka, telah merogol seorang perempuan Melayu bernama XXX KPT: YYY, berumur 18 tahun 5 bulan, oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.

[My translation:

That you on 22 July 2001 at about 10.00pm to 23 July 2001 at about 1.00am in a durian plantation shed, near the Sri Gapam Estate Bemban Melaka, in the District of Jasin, in the State of Melaka, did commit rape on a female Malay named XXX, NRIC No. YYY, aged 18 years 5 months and that you have thereby committed an offence punishable under s 376 of the Penal Code]

[2] For purposes of this judgment, the name of the female Malay and her NRIC No have been deleted and substituted with XXX and YYY respectively and shall be referred to hereinafter as 'the complainant' in order to protect her anonymity and in the interest of justice.

FACTS OF THE CASE

[3] Both the prosecution and the defence did not appear to demonstrate any substantial dispute as to the facts which, after an evaluation of the evidence adduced in the trial court, may be unfolded as follows.

[4] Three days prior to the episode, the accused called the complainant and spoke to her for about half an hour, and that was followed by another call to her the next day.

[5] On 22 July 2001, at about 10am, the complainant was at home at No J4648, Taman Merlimau Baru, Merlimau when she received yet another telephone call from the accused who was apparently no stranger to the complainant.

[6] The accused invited her to meet him in order to socialize in Pekan Merlimau, which invitation she readily agreed and accepted. Subsequently they met in Pekan Merlimau, from where the accused invited her to go to Pantai Klebang Rembau, Kuala Pilah and Seremban on the same day. She also readily agreed and followed, by riding pillion on the accused's motorcycle bearing registration number MAP 4482.

[7] In Seremban, both the accused and the complainant went together to a shopping complex in Senawang for food and were there until nightfall when they both returned on the motorcycle via the PLUS highway, taking the interchange at Alor Gajah, and then passing through Sungai Udang, Sungai Rambai, Tanjung Keling, Tanjung Bidara and Masjid Tanah.

[8] At about 8.40 of the same night, the accused brought the complainant to Umbai through a road in an oil palm plantation, where the accused told the complainant that the motorcycle was running out of petrol. After some discussion, the accused suggested that they spend the night in the shed until 4am the next day although the complainant counter proposed 2am.

[9] In the shed, the complainant sat down, and when the accused was lying down, the complainant followed, next to him, although she testified that she did not like the accused's face which was touching her cheek. However she did not attempt to run away from the shed nor slap the accused.

[10] There was an opportunity for the complainant to escape when the accused was burning a rubbish dump in order to create smoke to dispel mosquitoes and other insects, but she did not do so. Her clothes were not torn. She lodged a police report as she had been with the accused for the night through the wee hours of the morning and was not at home during those hours. During those hours, the accused embraced and kissed the complainant, with whom he later had sexual intercourse, not once but twice, although the complainant alleged that she resisted and threatened to report to the police.

[11] At about 1am on 23 July 2001, they left the shed, whereupon the accused asked the complainant to call her mother to inform her mother that the complainant had gone to a friend's house. While making the call, the complainant met a member of the Jawatankuasa Keselamatan dan Kemajuan Kampung (the Village Security and Development Committee) SP4 ('the village committee member') who brought the complainant to make a police report at Bemban police station. That report is No 293/2001.

[12] The evidence as adduced from the complainant is substantially similar to the content of her police report.

[13] The complainant was medically examined in the Melaka Hospital by SP3 Dr Lian Kok Liang together with a specialist, ie Dr Vincent Tan. SP3 Dr Lian, an obstretician and gynaecologist, confirmed penetration and fresh tears of the complainant's hymen at the 3 o'clock and 6 o'clock positions, with bruises at the 9.00 o'clock position. SP3 further testified that these injuries viz the said tears and bruises could be caused 'by having intercourse during peaceful love affair especially so when the patient was a virgin', and that if the complainant was a virgin and the size of the penis was big, the tear at posterior fourchette could be caused by sexual intercourse.

[14] The learned trial judge held that the medical evidence did not corroborate or support the evidence of the complainant who alleged that the said sexual intercourses were committed by the accused on her without her consent.

PROSECUTION'S SUBMISSION

[15] Cik Faradziah bte Kasah, learned deputy public prosecutor, who also conducted the prosecution in the trial court, raised the following grounds of appeal:

(1) that the trial judge has not fully considered the complainant's evidence that the sexual intercourses were committed by the accused without the complainant's consent;

(2) that the learned trial judge has misdirected himself on corroborative evidence when he found that the medical report on the complainant did not support the prosecution's case, and in failing to find that the complainant SP1 and the village committee member SP4 had corroborated each other, and that the evidence of other prosecution witnesses had corroborated the complainant.

[16] It was the prosecution's case that the accused had the sexual intercourses with the complainant without the consent of the complainant who has resisted but was overpowered by the accused who was mightier than the complainant.

[17] *Syed Abu Tahir a/l Mohamed Esmail v Public Prosecutor* [1988] 3 MLJ 485 (HC) was cited in support of the prosecution's aforesaid contention.

CONTENTION FOR DEFENCE

[18] Mr Markhan Singh, learned counsel for the accused, contended that there was consent on the part of the complainant to the accused having two sexual intercourses with her as she had agreed to follow the accused to all the aforesaid places on his motorcycle at all material times, and to spend their time together in the shed, instead of escaping on her own as the durian plantation was an open space, there being no threat by the accused who was not armed.

[19] He added that the injuries to the complainant's hymen were a result of 'consenting intercourse' as there was no act of violence occasioned by the accused.

[20] It was also argued that there was no corroborative evidence.

[21] For consent and corroboration, *Ab Malek bin Atan v Public Prosecutor* [2002] 4 MLJ 84 was cited as authority.

DECISION OF THE COURT

Issue for determination

[22] In my judgment, since the facts are not disputed by the defence, the issue for determination may be formulated as follows:

> Having regard to the aforesaid finding of facts on the basis of the evidence adduced for the prosecution, is the trial judge correct in acquitting and discharging the accused without calling for the defence on the ground that there was consent on the part of the complainant to the accused having two sexual intercourses with her?

Ingredients of the offence of rape

[23] Under s 375 of the Penal Code which provides for the offence of rape, a man is said to commit rape if he has sexual intercourse with a woman, eg without her consent. In order to establish a prima facie case of rape, the burden is on the prosecution to prove the following ingredients:

(1) sexual intercourse;

(2) penetration;and

(3) without consent.

[24] On the facts of the case, there can be no doubt that the prosecution has successfully proved the ingredients of sexual intercourse and penetration.

[25] Posing more of a problem to the prosecution is the thorny issue of consent on the part of the complainant.

[26] In *Ab Malek bin Atan v Public Prosecutor*, the accused was charged with two counts of rape. The complainant there testified that she was threatened by the accused who raised the defence of consent. The accused was found guilty and convicted by the sessions court. On appeal, Augustine Paul J (now JCA) held, inter alia, that where the accused raised the defence of consent, evidence of the manner in which the complainant was threatened by the accused was crucial to secure a conviction. There were unresolved contradictions in the evidence adduced by the prosecution in relation to the threat alleged by the complainant. In the circumstances, the learned appellate judge concluded that the conviction could not be sustained as there was indeed consent on the part of the complainant.

[27] In the instant appeal, on the basis of the evidence adduced in the trial court, the finding of facts do not seem to suggest any act of violence nor any element of threat. Whether or not there is consent on the part of the complainant is a question of fact which has to be proved by way of positive evidence.

[28] In *Public Prosecutor v Hassan bin Shamsuddin* [1981] 2 MLJ i, the accused was charged with the rape of a girl aged 20 years old, who had gone to the movies with the accused, after which they landed up in a hotel room. The case was heard by me as a President of Sessions Court Ipoh. In dealing with the question of consent, and acquitting and discharging the accused without calling for his defence, I said:

> To my mind, where there is no other evidence to the contrary to indicate the existence of consent of the complainant, then her words that she did not consent ought to be accepted by the Court and it is then up to the accused to prove on a balance of probabilities that the complainant had consented to the sexual intercourse. On the other hand, where the circumstances, as in this case, are such that the complainant had gone to the movies with the accused who by slow but sure persuasion managed to lure the complainant to a room in a public place such as a hotel, where the complainant shared the same room with the accused without any intention to leave the room or to dissociate herself from the companionship of the accused, her words alone that she did not consent should not be accepted as the whole truth, unless there is sufficient corroboration to the same effect.
>
> Consent is a mental element which by its very nature cannot be proved by direct evidence, and even if one breaks open the brain of another to look for consent, one can never succeed at all, for it is all too common to hear that the face and the person can be seen, but the mental element is not even remotely visible. Therefore, it is essential to look at the surrounding circumstances to arrive as nearly as possible at the true position in this case. As noted above, the circumstances of this case do not readily admit and concur with the mere statement of the complainant that she did not consent. On the contrary, her evidence has more than probably proved that she consented to the situation in which she was found and she cannot be said to be a victim of circumstances.

[29] In *Chiu Nan Hong v Public Prosecutor* [1965] 1 MLJ 40, on a charge of rape, there was a direct conflict of evidence between the accused and the complainant as to whether there was consent to the intercourse which took place — the complainant alleged she was frightened into submission, the accused saying that she willingly agreed. The facts of that case showed that the accused was the proprietor of a retail business while the complainant was a 29-year-old married woman and a typist. When they first met in a club in Kuala Lumpur, they spent the evening dancing and taking refreshment. They met again five days later at a party at the Eastern Hotel Cabaret. After dinner, the party went to the Cosmopolitan Club to eat at some nearby eating stalls, and then back to the Club. The party broke up at 3am. The third meeting between the accused and the complainant took place on the following day that the alleged rape occurred, in a vacant room at house No 1A Lorong Parry, Kuala Lumpur. The accused testified that he fetched two bottles of mineral water and two straws. Both the accused and the complainant drank some. After some preliminary love play, she co-operated in taking off her clothes and intercourse took place on the bed, and that she asked him to drive her home, which he did, and that when he drove away, she waved him goodbye.

[30] The trial judge, so did the Court of Appeal, found the accused guilty and convicted him, but the Privy Council in allowing the appeal and quashing the conviction, held that the circumstances did not afford corroboration of complainant's allegation of no consent.

[31] Reverting back to the appeal before me, after anxiously considering the entire evidence adduced for the prosecution, I hold that the facts and circumstances are more consistent with the existence of consent on the part of the complainant. Although it is true that the grounds of decision of the trial judge are comparatively brief, especially on the question of consent, they are founded upon the evidence adduced before him. Hence, I am unable to see any misdirection or miscarriage of justice.

3 Corroboration

[32] It is a rule of practice having the force of law that in sexual offences such as rape, the evidence of the complainant must be corroborated: see eg *Ab Malek Atan v Public Prosecutor* at p 415.

[33] In *Ah Mee v Public Prosecutor* [1967] 1 MLJ 220 (FC), Ong FJ (later CJ (Malaya) said at p 222 that corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence (see also *R v Clynes* [1960] 44 Cr App R 158 at p 161).

[34] In *Syed Abu Tahir*, Zakaria Yatim J (later FCJ) held, inter alia, that the acts of sexual intercourse were sufficiently corroborated by the two doctors who examined the girl and the accused respectively. In other words, medical evidence is sufficient to corroborate the girl on the act of sexual intercourse. The learned judge did not have to decide on the question of consent as the complainant was under the age of 14 years of age at the

material time and it was immaterial whether the girl has given her consent or not. Hence, that judgment is of no assistance to the prosecution in the instant appeal where corroboration is required of the ingredient of the absence of consent, as opposed to the act of intercourse which was the ratio decidendi in *Syed Abu Tahir*.

[35] The medical evidence adduced from Dr Lian in the instant appeal and as adumbrated above has indeed confirmed that the said sexual intercourses were the result of the combined consensual conduct and behaviour of two reasonable adults who were aware of their respective deeds.

CONCLUSION

[36] On the foregoing grounds, I am unable to see any error in the decision of the court below which I hereby affirm. I therefore dismiss this appeal.

Appeal dismissed.

Reported by Mariette Peters-Goh